

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

In re

Amendment of Section 73.202(b)
TABLE OF ALLOTMENTS,
FM BROADCAST STATIONS
(Mason, Texas)

)
)
) MM Docket No. 99-215
) RM-9337
)
)

To: The Chief, Allocations Branch,
Policy and Rules Division, Mass Media Bureau

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OPPOSITION TO MOTION TO DISMISS COUNTERPROPOSAL

Munbilla Broadcasting Corporation (*MBC*) hereby files its Opposition to the February 23, 2000 Motion to Dismiss Counterproposal filed by Jayson D. and Janice M. Fritz. By that Motion, the Fritzes seek dismissal of Munbilla's Counterproposal filed in response to the Commission's Notice of Proposed Rule Making (*NPRM*), 64 Fed. Reg. 33237 (published June 22, 1999), in the instant proceeding.

I. BACKGROUND

1. Munbilla's Counterproposal comprises two separate components. Munbilla seeks • the allotment of Channel 239C2 to Menard, Texas, as a first local service; and
• the allotment of Channel 249C2 to Fredericksburg, Texas, as a second local service.¹

¹The Fredericksburg allotment would require the substitution of Channel 273C2 for Channel 249C2 at Mason, Texas.

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2. The Fritzes second the claims of BK Radio's February 7 COMMENTS ON COUNTERPROPOSAL that Channel 249C2 at Fredericksburg would be fatally "... short-spaced to the previously filed, and cut-off, proposal for Station KVCQ(FM), Luling, Texas, in MM Docket No. 98-198." By means of this Opposition, Munbilla will address that claim.²

II. THE MERITS

3. Munbilla does not contest that its Channel 249C2 Fredericksburg proposal is short-spaced to a proposal, filed jointly by Sonoma Media Corporation and Gulfwest Broadcasting Company on December 21, 1998, seeking to relicense station KVCQ from Cuero, Texas, to Luling, Texas, and to upgrade its facilities from Channel 249C3 to Channel 249C2. Munbilla further does not contest the Commission's general policy, which the Fritzes have cited, to the effect that "...counterproposals must be technically correct at the time of their filing." Broken Arrow and Bixby, Oklahoma, and Coffeerville, Kansas, 3 FCC Rcd 6507, 6511 n.2, recons. den., 4 FCC Rcd 6981 (1989). However, that short-spacing and that policy do not mandate dismissal of Munbilla's counterproposal. Rather, they mandate dismissal of the KVCQ proposal, which is so fatally defective as to render it a nullity.

²The Fritzes have previously claimed that a typographical error in the Counterprosal, and erroneous reference to "Maxagrid," evinces a plot to subvert the allocations process. Munbilla has not addressed this claim, because the Commission has not yet solicited Reply Comments with respect to the Counterproposal, but for efficiency's sake, Munbilla will do so now. There is no sinister plot: Maxagrid and Munbilla are one in the same. Maxagrid Broadcasting Corporation, the licensee of radio stations KBAE, Marble Falls, Texas, and KBLK, Burnet, Texas, changed its name to Munbilla Broadcasting Corporation. The licensee informed the Commission of the name change and has filed applications in its new name. The reference to "Maxagrid" was simply one of habit by counsel, and remained undetected in proofreading. So much for a conspiracy in the shadows.

4. Most of the defects afflicting the KVCQ proposal have already been laid out for the Commission in another proceeding. See Attachment A. Munbilla will not burden the record with a detailed restatement of those flaws, as the exposition appears adequate. The Sonoma proposal, like any other proposal, cannot achieve cut-off status simply by being filed as of a certain deadline. In addition to being timely, the proposal must be acceptable for filing, because the whole purpose of the cut-off rules is to protect acceptable applications that are entitled to comparative consideration. E.g., Ranger v. FCC, 294 F.2d 240 (1961). As Attachment A demonstrates, the Sonoma proposal violates several threshold acceptability standards: violation of the Columbus, Nebraska policy; short spacing to Channel 284C3 at Llano, Texas (formerly occupied by Munbilla's station KBAE); short spacing to then-proposed Channel 291A at Mason, and failure to demonstrate the viability of a proffered alternative (Channel 295A), and failure to include a gain/loss study. Thus notwithstanding any timely status, the Sonoma proposal is not entitled to any comparative consideration. In fact, Broken Arrow precludes such.

5. Therefore, the Fritzes' (and BK's) position that the short spacing between Munbilla's Fredericksburg proposal and the (fatally defective) Sonoma/Luling proposal renders the Fredericksburg proposal itself defective is at war with the very policy they champion. Broken Arrow et al. dictates that the Sonoma-KVCQ proposal was dead on arrival. There is thus no public-policy justification for requiring Munbilla's Fredericksbug proposal to protect it.³ Because the Sonoma-KVCQ proposal was fatally defective and void *ab initio*, it has never properly been part of MM Docket 98-198. Therefore, MM Docket 98-198's cut-off date is no

³Munbilla is aware that the Commission accepted the Counterproposal for rule making by Public Notice of July 21, 1999 (Report No. 2346), but this was clearly erroneous.

bar to the acceptance of Munbilla's Fredericksburg proposal, and the policy against launching one rule-making proceeding contingent upon the outcome of another is not involved here.

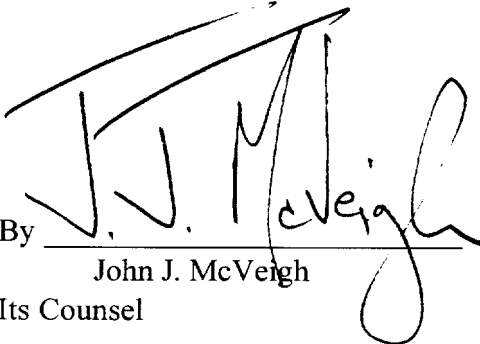
6. In addition to those defects, Munbilla takes this opportunity to point out that in Comments filed August 26, 1999, and in a Supplement dated November 17, 1999, the Fritzes themselves urge that the Sonoma-KVCQ Counterproposal in MM Docket 98-198 must be dismissed. Yet here they invoke the Sonoma proposal as a sword against Munbilla. It appears that the Fritzes are trying to have it both ways. Finally, it is worth noting that the KVCQ filing is based on a false premise: that station KTXC(AM) will continue to serve the community of Cuero. Station KTXC used to be licensed to that community, but the Commission canceled the station's license and deleted the call letters on June 18, 1998, six months before the KVCQ filing hit the Commission. The proposal is thus one to move to a smaller community the only functioning station licensed to a larger community, which would turn § 307(b) of the Communications Act on its head.

CONCLUSION

Based on the foregoing, Munbilla Broadcasting Corporation respectfully urges the Commission to deny the Motion to Dismiss Counterproposal.

Respectfully submitted,

MUNBILLA BROADCASTING CORPORATION

By 
John J. McVeigh
Its Counsel

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Date: March 6, 2000

ATTACHMENT A

JAN 5

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of

Amendment of Section 73.202(b))	
Table of Allotments)	MM Docket No. 98-198
FM Broadcast Stations)	RM - 9304
(Cross Plains, Texas et al.))	

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

JOINT REPLY COMMENTS

First Broadcasting Management, LLC, KCYT-FM License Corp., Gain-Air, Inc., ("FBM") and WBAP/KSCS Operating, Ltd. and Blue Bonnet Radio, Inc. ("WBAP") (collectively "FBM/WBAP"), jointly by their respective counsel, hereby oppose Commission acceptance of the Counterproposal filed by Gulfwest Broadcasting Company and Sonoma Media Corporation (collectively referred to as "Henderson").¹ The Henderson Counterproposal contains numerous legal and technical deficiencies which are fatal to Commission consideration.² In support hereof, FBM/WBAP states as follows:

1. Most notable of the various deficiencies is the violation of the Columbus, Nebraska 59 RR 2d 1185 (1986) policy of forcing three stations to change channels without their consent. Although Henderson originally included the consent of Station KBAL-FM, San Saba, Texas in its

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1. The other Counterproposal filed in this proceeding by Heftel Broadcasting Corporation, Metro Broadcasters-Texas, Inc., Jerry Snyder and Associates, Inc. and Hunt Broadcasting, Inc. is not in conflict with the Henderson Counterproposal.
 2. The Henderson Counterproposal conflicts with the FBM filing due to Henderson's expressed interest in Channel 272C1 at Cross Plains and FBM's proposal to substitute Channel 272C3 at Coleman, Texas. Henderson's Counterproposal conflicts with the WBAP Counterproposal in that Channel 272C1 at Cross Plains is short spaced to the WBAP proposal to substitute Channel 272C1 at Wichita Falls.

filing, that station has now withdrawn its consent in a separate filing to be submitted today. The purpose of the Columbus policy is to avoid implementation problems after the rule making proposal is granted. When more than two stations fail to agree in advance on the reimbursement amount and the timing of the channel and/or transmitter site changes, the Commission's resources can become overly burdened. For those reasons, FBM, on its part and WBAP, on its part, went to great lengths to assure themselves of the willingness and cooperation of every affected station involved in their respective proposals so that the implementation process can proceed smoothly. The Columbus policy serves a reasonable purpose and should be enforced.

2. Secondly, a review of Henderson's channel study for the substitution of Channel 281C2 at Mason, Texas indicates short spacings using the application sites of BK Radio and Foxcom, Inc. to Station KBAE on Channel 284C3, Llano, Texas. See Henderson Exhibits # 4B and 4C. Although the Commission deleted Channel 284C3 at Llano in MM Docket No. 95-49, that action is not yet final due, ironically, to the Petition for Reconsideration filed by Henderson in that proceeding. See Memorandum Opinion and Order in MM Docket No. 95-49 (DA 98-2564, released December 18, 1998).

3. Thirdly, to the extent Henderson is proposing the substitution of Channel 291A at San Saba rather than Channel 289A, Channel 291A is short spaced to a proposal to allot Channel 291A at Mason, Texas in MM Docket No. 97-244. See Henderson Exhibit # 7A. Henderson recognizes this short spacing and indicates that Channel 259A "has been counter proposed in Docket No. 97-244 at Mason, Texas." Henderson at Exhibit # 7A. However, in order to avoid being contingent on the outcome of another proceeding, Henderson should have submitted a channel study for Channel 259A at Mason and proposed that allotment as part of its Counterproposal. The Commission's policy in that regard is that "proposals are required to be capable of being effectuated at the time they are granted and cannot be contingent upon further action by third parties." Cloverdale,

Alabama, et. al., 12 FCC Rcd 2090, 2093 (1997). At this time, Henderson's proposal can not be effectuated without the final resolution of MM Docket No. 97-244 because no channel study was submitted by Henderson to show that an alternate channel works at Mason. By contrast, FBM/WBAP submitted channel studies for Channel 259A, 281A and 224A at Mason.

4. Fourth, Henderson proposes to change the community of license for Station KVCQ, Cuero, Texas to Luling, Texas (pop. 4,661 - 1990 U.S. Census) as its second local service. Cuero (pop. 6,700) does not currently have any other existing services. In Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989) recons granted in part, 5 FCC Rcd 7094 (1990), the Commission stated that one of the purposes to reallocate an existing station is whether the community would continue to have local service. Henderson cites no case law to support a smaller community receiving a second local service as a preferential arrangement even if Cuero were to be eventually served by another station during the pendency of this proceeding. Pursuant to Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982), the Luling proposal would fall under Priority 4, "other public interest factors." Certainly the smaller size of Luling compared to Cuero would, in the absence of any countervailing factors, cause the Commission to deny the reallocation. See e.g., Harrisburg and Albemarle, North Carolina, 7 FCC Rcd 108 (1992) aff'd 11 FCC Rcd 2511 (1996).

5. In addition, Henderson has not made the gain/loss showing typically required for a change in community of license. See e.g., Atlantic and Glenwood, Iowa 10 FCC Rcd 8074 (1995) and the showing that there would be five remaining services in the loss area. Ravenwood and Elizabeth, West Virginia, 10 FCC Rcd 3181 (1995). Under the current circumstances (a contested proceeding) Henderson should not be permitted another opportunity to provide this information. In Stamps, Arkansas 3 FCC Rcd 3644 (1988) the Commission stated that counterproposals must

contain all relevant information which allows the Commission to make the comparison between mutually exclusive proposals. The failure to submit relevant information is at the counterproponent's peril. The reasoning behind this requirement is to avoid unnecessary administrative proceedings so that opposing parties can reply to these showings at the proper time and avoid having the Commission to issue further requests for such information with replies to follow. Thus Henderson's failure to submit a gain/loss showing and a showing that five local services in the loss area will remain also makes Henderson's proposal defective.

6. Accordingly, for the above reasons, FBM/WBAP requests that the Commission deny acceptance of and dismiss the Henderson Counterproposal in this proceeding.

Supplemental Request

7. FBM and WBAP have determined that Channel 289A is available for substitution at San Saba for Station KBAL instead of Channel 291A. FBM and WBAP each submitted the statement of the licensee of Station KBAL, Equicom, Inc., consenting to the substitution of Channel 291A in their respective filings. It was noted that Channel 291A is short spaced to the pending proposal in MM Docket No. 97-244 to allot Channel 291A at Mason. Instead Channel 281A or 224A were proposed by FBM and by WBAP as substitutes should a channel be allotted to Mason. However, Channel 289A at San Saba will not require a different channel to be considered at Mason. See attached Engineering Statement. Therefore FBM and WBAP separately request that their respective proposals be amended to consider Channel 289A instead of Channel 291A as the substitute channel at San Saba. A revised consent statement from the licensee for both proposals is provided herein.

8. In addition the attached Engineering Statement provides a replacement exhibit for Figure 29 in order to correct the channel listed on the label to the figure.

Respectfully submitted,

FIRST BROADCASTING MANAGEMENT, L.L.C.
WBAP/KSCS OPERATING, LTD.
BLUE BONNET RADIO, INC.

By:

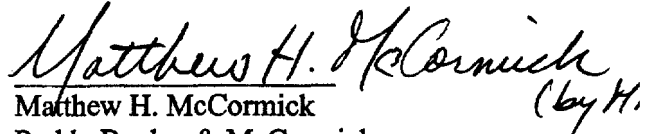


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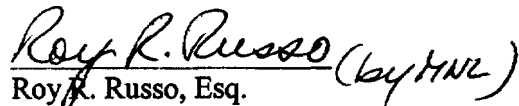
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ATTACHMENT B

SELLMEYER ENGINEERING
BROADCAST AND COMMUNICATIONS CONSULTING ENGINEERS
P.O. Box 356 McKinney, Texas 75070
MEMBER AFCCE
(972) 542-2056

ENGINEERING STATEMENT IN SUPPORT OF OPPOSITION TO
MOTION TO DISMISS COUNTERPROPOSAL
MM DOCKET NO. 99-215
MARCH, 2000

=====

This Firm has been retained by Munbilla Broadcasting Corporation ("MBC") to prepare this statement in support of its opposition to a Motion to Dismiss Counterproposal filed by Jayson D. and Janice M. Fritz ("Fritz").

In the instant counterproposal, MBC proposed allotment of FM broadcast channel 249C2 to Fredericksburg, Texas in lieu of Channel 249C2 at Mason, Texas, the substitution of channel 273C2 at Mason, Texas and allotment of channel 239C2 at Menard, Texas.

The allotment of channel 249C2 to Fredericksburg, Texas would provide its first local fulltime FM service to complement its present daytime only AM broadcast service.

The instant Motion to Dismiss Counterproposal asserts that the MBC counterproposal is fatally flawed. This Engineering Statement will show that it is not flawed and is, indeed, acceptable as a counterproposal in Docket 99-215.

Fritz asserts that the MBC counterproposal is fatally flawed with respect to the allotment of Channel 249C2 to Fredericksburg due to a shortspacing to a counterproposal by Gulfwest B/C Company to relocate Station KVCQ, Cuero, Texas to Luling, Texas in Docket 98-198.

Indeed, the counterproposal filed by MBC shows the short spacing to the KVCQ counterproposal. The proposed city of license is mislabelled as "Luring, Texas". However, this proposal is itself fatally flawed. The counterproposal removes the only existing service from Cuero, Texas, a community with a 1990 population of 6700 persons and proposes reallocation to Luling, Texas, a community of only 4661 persons. The proposal alludes to an AM service remaining in the city of Cuero. However, the license for this facility which carried the call letters KTXC was cancelled by the Commission and the call letters were deleted on June 18, 1998. The MBC counterproposal was filed on August 2, 1999, more than one year after the Cuero AM facility ceased to exist. There being no other existing broadcast services allotted to or operating in Cuero, the Gulfwest counterproposal could not be granted at that time, nor could it be granted today. The proposal clearly does not comply with longstanding Commission policy regarding removal of the only existing broadcast service from a community.

The MBC proposals for Menard, Mason and Fredericksburg fully comply with the Rules and could be granted without contingencies.

SELLMEYER ENGINEERING
BROADCAST AND COMMUNICATIONS CONSULTING ENGINEERS
P.O. Box 356 McKinney, Texas 75070
MEMBER AFCCE
(972) 542-2056

CERTIFICATION OF ENGINEER

I hereby state that:

I am President of Sellmeyer Engineering

The Firm of Sellmeyer Engineering has been retained by Munbilla Broadcasting Corporation to prepare this Engineering Exhibit

I am a graduate of Arizona State University with the degree of Bachelor of Science in Engineering

I am a Registered Professional Engineer in the States of Ohio and Texas

My qualifications as an Engineer are a matter of record with the Federal Communications Commission, having been previously accepted in applications of this type

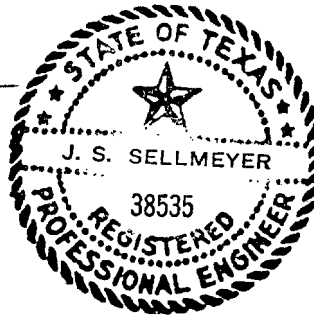
This Engineering Exhibit was prepared by me personally or under my direct supervision, and

All facts stated herein are true and correct to the best of my knowledge and belief.


J. S. Sellmeyer, P. E.

March 2, 2000

P. O. Box 356
McKinney, Texas 75070
972-542-2056



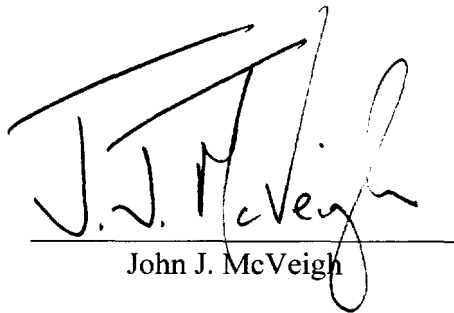
CERTIFICATE OF SERVICE

I hereby certify that I have, this Sixth day of March, 2000, sent copies of the foregoing **OPPOSITION TO MOTIUN TO DISMISS COUNTERPROPOSAL**, by first-class United States mail, postage prepaid, to:

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Counsel to Rawhide Radio, L.L.C. (successor-in-interest to
Sonoma Media Corporation)



John J. McVeigh

MICHAEL J. DINELLI

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February 26, 2000

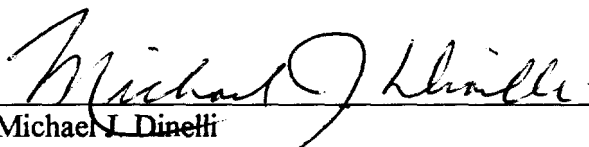
Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12 Street, SW
Washington, DC 20024-2101

**REF: Wormser, Adsit, and Dinelli Petition for Partial Reconsideration,
regarding WT Docket 98-143 and Report & Order FCC 99-412
Revised February 22, 2000**

By my signature below, this letter verifies that the petition referenced above was filed by Alan Wormser, N5LF, on my behalf, per the appearance of my name and address in the header of the petition.

Eleven copies, signed in ink, are enclosed for the Commissioners. One may be attached to each of the eleven copies provided by Mr. Wormser, if that is appropriate.

Thank you.

By: 
Michael J. Dinelli
ARS N9BOR

Enclosures: Eleven (11) signed copies of this letter.

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List A B C D E

MICHAEL J. DINELLI

February 26, 2000

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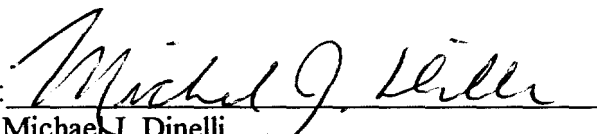
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MAR 6 2000
FEDERAL COMMUNICATIONS COMMISSION

**REF: Wormser, Adsit, and Dinelli Petition for Partial Reconsideration,
regarding WT Docket 98-143 and Report & Order FCC 99-412
Revised February 22, 2000**

By my signature below, this letter verifies that the petition referenced above was filed by Alan Wormser, N5LF, on my behalf, per the appearance of my name and address in the header of the petition.

Eleven copies, signed in ink, are enclosed for the Commissioners. One may be attached to each of the eleven copies provided by Mr. Wormser, if that is appropriate.

Thank you.

By: 
Michael J. Dinelli
ARS N9BOR

Enclosures: Eleven (11) signed copies of this letter.

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